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No. 84-1802

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EARL'S PUMP AND SUPPLY COMPANY, INC. and GRACO, INC.
Petitioners,

v.

COLBERG, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEE H. CLIFF
HENRY D. DICUM
HALL, HENRY, OLIVER & MCREAVY
A Professional Corporation
100 Bush Street, Rm. 1200
San Francisco, CA 94104
Telephone: (415) 982-5293
Counsel for Respondent
Colberg, Inc.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH STREET • S.F., CA 94103 • (415) 864-2300

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QUESTION PRESENTED

Did the California court correctly hold that, notwithstanding this Court's opinion in *Lockheed Aircraft Corp. v. United States*, (1983) 460 U.S. 190, concerning the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*, Congress intended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905, to preclude a third party from obtaining indemnity or contribution from an employer who has paid benefits under that Act?

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate in describing (1) the indemnity rights Petitioners' claim under "well settled California law", (2) what other lower federal courts have held regarding the scope of § 905, (3) what Congress intended by that section, and (4) what this Court has "held" with regard to employer indemnity under the LHWCA.

(1) California Labor Code § 3864 bars non-consensual employer indemnity, and *American Motorcycle Ass'n. v. Superior Court*, (1978) 20 C.3d 578, 607 n.9, expressly excepts such indemnity from its ruling (relied on by Petitioners) that all negligent parties may be liable in indemnity or contribution for injuries caused by them. What Petitioners attempted to obtain below was the avoidance of the aforementioned settled law by contending that payments made under LHWCA (rather than the State Act) erase both the statutory bar and express exception in *American Motorcycle* for employer indemnity liability.

(2) Petitioners omit the fact that the district court in *All Maine Asbestos Litigation (BIW) Cases*, 589 F. Supp. 1763

(D.C.Me. 1984) in fact *barred* employer indemnity because of an exclusive remedy provision in its State Act, holding it applicable to LHWCA covered injuries as well as those covered by the State Act. Petitioners further *ignore* the other two district court decisions subsequent to *Lockheed Aircraft Corp. v. United States*, 460 U.S. 90, 1035 S.Ct. 1033 (1983), which expressly *rejected* the application of FECA cases to LHWCA cases on employer indemnity because of their different legislative and decisional histories. Such were the rulings in *Krzywicki v. Lash Barge P1-1-0325*, (D.Md. 1983) (1984 A.M.C. 1367, and *Murphy v. Mississippi Barge Line Co.*, (N.D.Ill., No. 82-C-937), decided November 18, 1983 and published by Lexis, a copy of which opinion is attached.

(3) The intent of Congress under LHWCA has been markedly different regarding the rights of employers paying the insurance premiums necessary to fund the high benefits under the LHWCA, as opposed to its intent regarding the need for protection of the United States government as employer under FECA. The decision below (Appendix to Petition, p. 8-14) pointed out the difference in history between FECA and LHWCA indemnity claims against employers and held *Lockheed* did not intend a change in the existing law on employer indemnity under the LHWCA. Further, the legislative history, written *subsequent* to *Lockheed* concerning recent amendments to § 905, evidences that continuing intent by explaining that the Conference Substitute between the Senate and the House adopted without change the rule of exclusive liability for shipbuilders in the Senate bill, which the legislative history states was intended to bar employer indemnity:

> "Further, the bill, anticipating that a shipbuilder may be indirectly exposed to liability above compensation through actions by third parties grounded on theories of contractual or tort indemnity or contribution, bars those actions as well." (*4 U.S. Code Congressional and Administrative News*, 98th Congress, 2d Session 1984, pp. 2773-4)

(4) This Court in *Lockheed* pointed out that its decision was clearly *limited* to the exclusive remedy provision of FECA *only* (103 S.Ct. at 1038), and further pointed out at footnote 8 that the

LHWCA cases "are entirely irrelevant" to its decision on the FECA provision.

Lastly, Petitioners' statement of the case omits the reliance by the decision below on the need for *uniformity in treatment of waterfront employment claims*, which would outweigh any state local tort interest (even if different from the federal rule) in coastal areas (Pet. A-14). In so holding the court below merely followed an earlier California decision reiterating that need for uniformity, in *Schreefel v. Okuly*, (1983) 143 Cal.App.3d 818, 825.

In summary, Petitioners' statement of the case fails to establish a reason to support the granting of *Certiorari* in this case.

NO REASONS FOR GRANTING THE WRIT EXISTS

1. The Decision Below Does Not Disturb California Law, Which Also Denies Employer Indemnity.

The petition cites *American Motorcycle, supra*, to establish what it claims to be "well settled" California law permitting employer indemnity. As explained above, California Labor Code § 3864 expressly precludes such indemnity excepting by prior written agreement:

> "If an action as provided in this Chapter prosecuted by the employee, employer or both jointly against a third person results in judgment against such person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third party harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury period."
>
> (California Labor Code § 3864, enacted 1959.)

Section 3864 was enacted to "overrule" *San Francisco Unified School District v. California Building Maintenance Company*, 162 Cal. App. 2d 434 (1958), which had adopted the then-new federal implied-in-fact contract of indemnity theory created by the Court in *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124 (1956). *See*, 2A Larsen, Workmen's Compensation Law, §§ 76.20 and 76.80.

Thus, Labor Code § 3864 *restated* the general rule against employer indemnity and expressly covered the new *Ryan* theory so as to return the law to its status before the *School District* case. Petitioners below attempted to *avoid* the aforementioned law by claiming that since compensation herein was paid under the LHWCA rather under than the state act, § 3864 did not apply. Yet personal injury claims against non-employers undeniably *predate* the compensation acts and exist without reference to them. This fact is even codified in California Labor Code § 3852 which states:

> "The claim of an employee for compensation does not affect his claim or right of action for damages proximately resulting from such injury or death against any person other than the employer."

In any event what possible policy difference could apply based upon under which act the compensation was furnished?

Moreover, *American Motorcycle* expressly excepts employer indemnity cases from its reach:

> "There are, of course, a number of significant exceptions to this general rule. For example, when an employee is injured in the scope of his employment, Labor Code § 3864 would normally preclude a third party tortfeasor from obtaining indemnification from the employer, even if the employer's negligence was a concurrent cause of the injury."
>
> (*Id.*, at 607, n.9)

Petitioners also rely on *Associated Constr. & Engineering Co. v. Workers Compensation Appeals Bd.*, 22 Cal.3d 829 (1978) to support California's "policy." Yet, *Associated* relates only to third parties defending against a *compensation* lien. That is not the issue before this Court, nor was it the issue before the court below, and Petitioners make no contention here that it applies to this case. (Petition, p. 9, fn. 8)

It is clear from Labor Code § 3864 and the reason for its passage, to avoid the effect of the *Ryan* doctrine, that it is neither the California law nor public policy to have employers indemnify third party defendants for injury claims brought by their

employees. Thus, Petitioners' attempt to create a "Catch 22" situation permitting employer indemnity only where payments were made under LHWCA rather than the state act would itself conflict with the California law and policy.

2. Congress Did Intend to Bar Non-Consensual Indemnity by LHWCA Employers.

As the court below noted:

> "Appellants acknowledge that prior to the United States Supreme Court decision in *Lockheed* the exclusiveness of liability provisions of LHWCA had been construed to preclude any actions for indemnity or contribution against an employer based on allegations of negligence. We are satisfied that the clear weight of authority so held."

(Petition, A-8.)

The court below then discussed the theories of cases from *Halcyon Lines v. Haenn Ship Corp.* (1951) 342 U.S. 282, through *Cooper Stevedoring Co. v. Kopke, Inc.* (1974) 417 U.S. 106, (Petition, A-10-12) pointing out that the rule enunciated in *Halcyon* precluding employer tort indemnity under LHWCA was still pronounced "good law" in *Kopke*. These cases concerned the LHWCA prior to the 1972 amendments, during which time this Court held in *Nacerima Operating Co. v. Johnson* (1969) 396 U.S. 212, 217, that the LHWCA was then *co-extensive* with the then existing traditional admiralty *situs* jurisdiction rule, which stopped at the dockside (except for drydocks). Thus, the law as established from the passage by Congress of the LHWCA in 1927 to its 1972 amendments was all under traditional admiralty maritime jurisdiction. It was this background that was the distinguishing factor between the LHWCA and FECA, because the latter, as shown by this Court in *Lockheed,* looked to the applicable *state* law rather than any underlying federal law for its substantive law.

The court below next considered whether the Congress in 1972 intended to *change* the then existing rule precluding employer indemnity under LHWCA payment conditions (A-13). The court reviewed the "partial encroachment on the employers'

immunity" based upon the implied *contract* theory developed in *Ryan, supra.* (A-12.) The Court below then held the 1972 amendments were intended to abrogate the *Ryan* decision which had been the *only* "partial encroachment" on the employers' immunity. The Court below then found the congressional intent:

> "The congressional intent expressed in the amendment is clear: it was to end the circuity of actions in which the employer might be liable in excess of his LHWCA responsibilities to the end that the employer's resources be used to provide improved benefit levels rather than defray the costs of multiple liabilities. (See *Standard Fruit & Steamship Co. v. Metropolitan Stevedore Co., supra,* 52 Cal.App.3d at pp. 311-312, and the excerpt from the Congressional Record published therein, fn.1.)"
>
> (A-13)

The decision below then pointed out that the "judicial and congressional history of FECA and LHWCA differ completely despite the similarity of the language of each." (A-13.) It then properly drew the inescapable conclusion:

> "To the extent the high court had earlier permitted a circuitry of actions whereby an employer could be indirectly liable for an employee's damages, Congress acted in clear and certain terms to abrogate such a judicial construction by enacting the 1972 amendments to LHWCA. The Congressional Record reveals a clear intent that such circuitous actions should not be permitted."
>
> (A-14.)

We note that this Court in *Lockheed* expressly held LHWCA cases to be "entirely irrelevant" to the question before it regarding the FECA provision. (*Lockheed, supra,* fn.8.) Further, the Court ended its decision in *Lockheed* by stressing that it related only to FECA, which was because of the different congressonal intent with respect to *that* Act. (*Lockheea, supra,* 103 S.Ct. at 1038.)

The petition refers to the alleged similarity between New York state law as to indemnity claims against employers and federal LHWCA law. However, New York state courts have themselves

consistently disallowed third-party indemnity claims in tort against LHWCA employers, (*Bottalico v. Todd Shipyards Corp. et al.* (1980) 107 Misc. 2d 942; 436 N.Y. Supp. 2d 112; *Magno v. Waterman Steamship Lines* 1983 A.M.C. 360, 362 (NYAD, 1983)).

The petition cites *Potomac Electric Co. v. Director OWCP*, 449 U.S. 268, 276 (1980) as showing similarity between the two Acts. *Potomac* did not concern interpretation of the exclusive liability of employers under LHWCA. It concerned only the calculation of diability benefits under LHWCA.

Similarly, *Weyerhauser S.S. Co. v. U.S.*, 372 U.S. 597 (1963), a 1963 FECA case, is obviously no kind of authority on the legislative history of the 1972 amendments to LHWCA. *There is no equivalent in FECA to the LHWCA amendments,* as pointed out by *Lockheed* and the court below (A-9-10, 13-14).

The petition also overlooks the decisions of our own local jurisdictions which expressly interpret the 1972 amendments as evidencing congressional intent to bar all employer non-consensual indemnity cases to stop circuity of action and permit maximum benefits to reach the injured employees. (*SS Seatrain Louisiana, etc. v. California Stevedore* (N.D.Cal. 1976) 424 F.Supp. 180; *Schreefel v. Okuly* (1983) 143 Cal.App.3d 818; *I.T. Corp. v. Superior Court* (1978) 83 Cal.App.3d 443.) Likewise, the petition overlooks the two post-*Lockheed* District Court decisions from the other districts noting the distinction between historical background and obvious congressional intent between FECA and LHWCA: *Krzywicki v. Lash Barge P.L. 1-0325* (D.Md. 1984) 1984 A.M.C. 1367; *Murphy v. Mississippi Barge Line Co.* (N.D. Ill. 1983) No. 82-C-937 (attached).

The most recent legislative history, written subsequent to *Lockheed,* concerning the 1984 amendments to Section 905, explains that the Conference Substitute between the Senate and the House adopted without change the rule of the exclusive liability for shipbuilders proposed in the Senate bill, which the legislative history states was intended to bar employer indemnity:

> "Further, the bill, anticipating that a shipbuilder may be indirectly exposed to liability above compensation through

> actions by third parties, grounded on theories of contractual or tort indemnity or contribution, bars those actions as well."
>
> (4 U.S. Code, Congressional and Administrative News, 98th Congress, 2d Session 1984, p. 2773-4.)

It is apparent that this post-*Lockheed* legislative history evidences legislative intent *continuing* from the 1972 amendments to roll back any attempt to *create* employer non-consensual indemnity where none had existed since the original passage of the Act in 1927.

Perhaps inadvertently, the petition at page 7 points out the distinction between the facts in *Lockheed* involving the federal government's own uninsured liability under FECA, and the asserted indemnity liability of a private insured employer over and beyond his compensation obligations under LHWCA, which necessarily would hamper his ability to fund the increased benefits under the Act brought about by the 1972 amendments. Thus, contrary to the Petition's assertions, the further imposition of additional tort liability on a private employer beyond his increased compensation insurance costs would be detrimental to the LHWCA system and the need for uniformity.

3. No Decisions Grant LHWCA Employer Tortious Indemnity and No Conflict Exists.

Although conflict in decisions is not a ground for *Certiorari* under Rule 17(c), in any event, no decision grants employer indemnity against an LHWCA employer. The only case urged by petitioner, the *All Maine* case, expressly *denied* employer indemnity under the state act. This is in marked contrast to the many other decisions cited hereinabove supporting the decision below and explaining the long-standing congressional intent since the inception of the Act in 1927 against employer indemnity and the need for uniformity in the handling of waterfront employee-injury claims.

Moreover, two other 1984 District Court decisions, without even discussing *Lockheed's* ruling on the exclusive remedy provision in FECA, noted that Section 5 of LHWCA bars employer non-consensual indemnity: *Bradford v. Indiana &*

Michigan Elec. Co. (S.D.W.Va. 1984) 588 F.Supp. 708, 715; *Triguero v. Consolidated Rail Corporation* (S.D.N.Y. 1984) 585 F.Supp. 1202, 1203. Accordingly, there is no conflict between *any* decisions on the issue sought to be heard in this Court.

4. Federal Interest in Uniformity Would Outweigh Any Conflict with California Law Were One to Exist.

As pointed out above, the petition constructs an argument indicating an alleged "conflict" between the decision below and "well settled California law", when in reality the California law applicable to a non-consensual employer indemnity is the same as the result reached by the decision below. Petitioners propose a "Catch-22" situation urging a *different* and special result here merely because payments were made under LHWCA rather than the state act. The rationale for any such special result for Petitioners in this case falls before the well recognized need for uniformity of waterfront employer-employee injury claims matters. The aforementioned recent legislative history surrounding the 1984 amendments to the Act reiterate this congressional intent to secure employers from indemnity liability beyond the generous LHWCA benefits payable due to the high compensation insurance premiums paid by employers:

> "S. 38 as reported by the Committee on Education and Labor, is intended to reduce the cost of Longshore coverage for employers in the covered industries in a manner which will disturb, to the most limited extent possible, the rights and benefits which the Longshore Act provides." (4 U.S. Cong. and Adm. News, 98th Cong., 2d Sess. 1984, p. 2736)

5. In Any Event, the Case Below in Fact Involved Traditional Maritime Jurisdiction Over Marine Railway Drydock Accidents.

The California District Court of Appeal below erred in its *dicta* (Petition, A-5) that the admiralty jurisdiction *situs* requirement had not been shown because the "barge upon which the accident occurred had been hauled up out of the water on Colberg's marine railway and was not upon navigable water." (A-5.)

The erroneous *dicta* by the Court of Appeal below was apparently based upon the over-simplification of the words "navigable waters", which over-simplification was treated by this Court in *Nacirema Operating Co. v. Johnson, supra,* 396 U.S. 217, and again adverted to by this Court in *Director, etc. v. Perini North River Associates* (1983) 459 U.S. 297, 103 S.Ct. 634. *Johnson* recognized that the traditional inclusion of drydocks as a proper admiralty *situs* existed even though they were not floating, stating:

> "If Congress had thought the words 'upon the navigable waters' were broad enough to embrace the limits of admiralty jurisdiction, there would have been no need to include the parenthetical 'including any drydock'."
>
> (396 U.S. at 217, fn.10)

In fact, it was at the specific suggestion (396 U.S. at 224) of this Court in *Johnson* that Congress enacted the 1972 amendments *increasing* the scope of LHWCA shoreward *beyond* the traditional admiralty jurisdiction. Thus, although the scope of the LHWCA *now* clearly exceeds that of traditional admiralty jurisdiction based solely upon *situs*, it did not prior to the 1972 amendments under *Johnson.* This was again made clear in *Perini, supra,* where this Court stated:

> "We use the expression 'actual navigable waters' to describe the covered situs as it existed in the 1927 LHWCA, 44 Stat. 1424.: 'Navigable waters of the United States (including any drydock).' 44 Stat. 1426. As explained below, the 1972 amendments to the LHWCA expanded the concept of 'navigable waters' to include certain adjoining shoreside areas. Section 3(a) 33 U.S.C. § 903(a)."
>
> (103 S.Ct. at 638, fn.2)

As the Supreme Court had also previously noted, a marine railway is but a type of drydock and is within the admiralty jurisdiction even if, as with any other drydock. the ship is temporarily over land instead of the water. (*Avondale Marine Ways v. Henderson* (1953) 346 U.S. 368, 369.)

The decision below in its erroneous *dicta* relied on a quote from *Rodrique v. Aetna Casualty & Surety Co.* (1969) 395 U.S. 352, 360. The quotation is:

> "The admiralty jurisdiction. . . [does not] extend to accidents on piers, jetties, bridges or even ramps or railways running into the sea."
>
> (395 U.S. at 360)

The quotation from *Rodrique*, which predated *Johnson*, is not support, in light of this Court's pronouncements in *Johnson* and *Perini*. *Rodrique* involved the question of whether a man-made island on the Outer Continental Shelf was within the admiralty jurisdiction. It was held that the island was like a pier or other land structure built out over the water, and hence was not in admiralty jurisdiction. The quotation from *Rodrique* referred to "railways running into the sea". A marine railway is much more than a railway running into the sea. It is a type of drydock consisting of a movable cradle, to permit repair of existing vessels, not movement of new vessels to the sea. (*O'Leary v. Puget Sound Bridge & Drydock Co.* (9th Cir. 1965) 349 F.2d 571, 573.) The cases cited by *Rodrique* in support of the quotation referred to pier and other land-extension cases, including *Hastings v. Mann* (4th Cir. 1965) 340 F.2d 910, which involved a launching ramp for small boats from car trailers, not a marine railway used for repair of ocean vessels. Thus the *Hastings* structure was similar to a pier used to bring things to the water.

Our research has produced one case which did not follow this Court's rulings holding marine railways to be the same as any other drydock and within traditional admiralty jurisdiction. That sole case is *Delome v. Union Barge Line Co.* (5th Cir. 1971) 444 F.2d 225. The court in *Delome* apparently equated traditional admiralty jurisdiction with "wet" navigable waters only and found it lacking because the barge therein was 65 feet inland and no part of it was actually then in navigable water. The court then agreed that there was no distinction "between marine railways and other types of drydocks" at page 231, and then at footnote 10, seemed to limit the application of the marine railway cases solely to coverage under LHWCA, erroneously assuming that LHWCA

coverage (before the 1972 amendments) *then* exceeded and differed from traditional admiralty jurisdiction.

While citing *Johnson*, the court in *Delome* failed to to recognize that this Court's holding in Johnson was that coverage under the Act (prior to 1972) was then *co-extensive* with traditional admiralty jurisdiction, which included marine railways and other drydocks even out of water. It was precisely this holding in *Johnson* on traditional admiralty jurisdiction which *precluded* coverage under the Act (before 1972) of an injury on a pier regardless of The Extension of Admiralty Jurisdiction Act of 1948 (46 U.S.C. § 740), passed substantially after the original act of 1927.

Thus, *Delome* failed to recognize the old "Hornbook law" which the Supreme Court had followed in its earlier decisions holding admiralty jurisdiction included marine railway drydock injuries. See *Robinson on Admiralty,* Hornbook Series (1939) p. 88:

> *"Personal Injury When a Ship is in Drydock.*
>
> * * *
>
> "But ships may be out of water on a purely land structure or out of water on a structure which itself is afloat. They may also be on a marine railway which stretches from land into water, and a vessel on it may itself be wholly or partially out of water. Actually, insofar as the cases go, these distinctions have been largely ignored, and the causes of action have been regarded as maritime even when the vessel at the time of the injury is not water-borne either directly or indirectly."

In summary, even were there a conflict between the California law regarding employer indemnity and the decision below, that decision's error in its aforementioned *dicta* regarding admiralty *situs* jurisdiction, if corrected or disregarded, would preclude the applicability of any alleged conflicting California law and thus would further make the decision below not a proper candidate for *Certiorari* before this Court.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should not issue to review the opinion below.

Respectfully submitted,
LEE H. CLIFF
HENRY D. DICUM
HENRY, HALL, OLIVER & MCREAVY
A Professional Corporation
100 Bush Street
San Francisco, California 94104
Counsel for Respondent

(Appendix follows)

Appendix

BONNIE R. MURPHY, Administrator of Estate of George B. Murphy, deceased, Plaintiff. v. MISSISSIPPI VALLEY BARGE LINE CO., et al., Defendants.

No. 82 C 937

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Slip Opinion

November 18, 1983

OPINION BY: GRADY

OPINION: MEMORANDUM OPINION

This is an action under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq., arising out of the death of plaintiff's decedent, who was fatally injured while removing the cover of a docked barge. Plaintiff sued the owner of the barge (the "vessel"). The vessel, as third-party plaintiff, impleaded the designer, seller, and builder of the barge ("Caruthersville") as third-party defendant, for contribution or indemnity. Caruthersville, as fourth-party plaintiff, impleaded plaintiff's decedent's employer (the "Employer"), as fourth-party defendant have each filed a motion to dismiss. We deny the motion of third-party defendant and grant the motion of fourth-party defendant.

(1) *Caruthersville Motion to Dismiss*

Third party defendant Caruthersville has moved to dismiss Counts I and II of the third-party plaintiff vessel's complaint. Count I sounds in strict liability and seeks recovery either in contribution or indemnity. Count II sounds in negligence and also seeks recovery for contribution or indemnity.

Caruthersville argues that the vessel's third-party action is barred because there is no express or implied recourse to contribution of indemnity in the LHWCA for a vessel. Caruthersville argues that the LHWCA provides for no such action, and that the

1972 amendments to the LHWCA prohibit us from implying one. We reject Caruthersville's arguments.

It is true that the LHWCA does not expressly provide that a vessel may sue a third party for contribution or indemnity. However, contrary to defendant's suggestions, both such actions are well-recognized and well-established in admiralty law. See *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974) (contribution allowed against non-employer); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-272 n. 30 (1979) (contribution); *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) (indemnity). This nonstatutory right to contribution was fashioned by the Supreme Court pursuant to the unique authority to fashion flexible and equitable remedies in admiralty which the Constitution gives to federal courts. *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 95-96 (1981).

Caruthersville's reliance on the 1972 amendments is equally unavailing. In 1972, Congress amended the LHWCA to provide, in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. 33 U.S.C. § 905(b) (emphasis added).

By its terms, this amendment only alters a vessel's right to indemnity from the employer of the injured person. In our case, however, the vessel is suing Caruthersville, which was not the injured person's employer but rather was the designer, builder and seller of the ship. Therefore, the 1972 amendments would require us to deny Caruthersville's motion to dismiss. Accord, *Meekins v. Prudential Lines, Inc.*, 1981 A.M.C. 1740 (E.D. Va. 1979).

Caruthersville argues nonetheless that Congress, by limiting the vessel's right against the injured person's employer, has established a comprehensive remedial scheme which evidences an intent not to authorize additional remedies. Actually, the reverse is true. In *Edmonds, supra*, the Supreme Court held that because in the 1972 amendments Congress only limited the vessels's rights as against the employer, Congress meant not to disturb other, judge-made admiralty law:

> Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned. 433 U.S. at 273.

Therefore, since before the 1972 amendments there was a right in the vessel to contribution or indemnity against third-party non-employers. That right still exists unless Congress explicitly acted to remove it, which, as we have stated, Congress has not done.

Further, the Supreme Court has very recently stated that in the 1972 amendments, "Congress abolished the indemnity action only in conjunction with a 'quid pro quo' to benefit the third parties." *Lockheed Aircraft Corporation v. United States*, ____ U.S. ____, 103 S.Ct. 1033, 1038 (1983). Since the 1972 amendments did not include a similar quid pro quo to benefit vessels vis-a-vis a non-employer such as Caruthersville, the vessel's pre-1972 right to seek contribution or indemnity remains.

(2) *Employer's Motion to Dismiss*

As fourth-party plaintiff, Caruthersville brought a one-count complaint against the Employer for negligence and seek recovery on a theory of contribution. n.1 The Employer argues that Caruthersville's suit is barred because under *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), contribution in not available in an LHWCA case against the employer of the injured person.

n.1 Caruthersville argues in its response brief that "the underlying premises of the contribution count is the same as if it had been drafted seeking non-contractual indemnity." Caruthersville

then unilaterally decided to treat its complaint for purposes of this motion "as if it had included a separate count for non-contractual indemnity, it may file an amended complaint within 21 days. The Employer may within 21 days thereafter file any appropriate motion to dismiss, and we would at that time consider the sufficiency of the pleading.

In *Halcyon*, a vessel which had been sued by an injured employee sought contribution from the employer. The Court held that Congress had not provided for contribution in such a case. Twenty years later, in *Atlantic Coast Line Railroad Co., v. Erie Lackawanna Railroad Co.*, 406 U.S. 340 (1972), the Court, relying on *Halcyon*, held that a non-vessel also could not seek contribution from an employer in a suit by an injured employee. *Atlantic Coast* would seem to be directly on point here, since the fourth-party complaint, too, involves a non-vessel, Caruthersville, suing the Employer for contribution. However, a recent Supreme Court case, *Lockheed Aircraft Corporation v. United States*, ____ U.S. ____, 103 S.Ct. 1033 (1983), requires us to analyze the issue further.

In *Lockheed*, a civilian employee of the Navy died when a plane manufactured by Lockheed crashed. The government paid death benefits to the employee's survivors under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 et seq., and the employee's administrator then sued Lockheed as the manufacturer of a defective product. Lockheed impleaded the government as a third-party defendant seeking indemnity. The government, relying on a limitation of liability provision in the FECA which is nearly identical to § 905(a) of the LHWCA, argued that it could not be sued.

Both the FECA and the LHWCA contain provisions which eliminate an employer's liability to injured employees, their families, people claiming through them or on their behalf, and "any other person entitled to recover" (FECA) or "anyone otherwise entitled to recover" (LHWCA). Lockheed held that the FECA limitation of liability provision did not bar Lockheed from seeking indemnity from the government. The Court held that the limitation of liability provision only ran in the government's favor when the government was sued by an employee or someone claiming

through the employee, but not when the government was sued by an unrelated third party. In other words, the Court held that an unrelated third party such as Lockheed was not included in the statutory category of "any other person entitled to recover."

The *Lockheed* Court basically relied on an earlier case, *Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597 (1963), which it found indistinguishable. However, the court also noted the 1972 LHWCA amendments, which as we discussed above, eliminated a vessel's right to seek indemnity against an injured person's employer. In eliminating that right, Congress also eliminated the employee's right to sue the vessel in strict liability. The *Lockheed* Court read those amendments to mean that it should not upset settled liability schemes under the FECA or the LHWCA unless Congress provided a similar tradeoff for the benefit of the party whose liability was sought to be expanded. Therefore, since Congress had not provided a tradeoff for the benefit of unrelated third parties in FECA cases, the Court would not eliminate the rights of unrelated third parties under *Weyerhaeuser* to sue the injured person's employer for indemnity.

Caruthersville argues that since *Lockheed* held that the FECA limitation of liability provision did not prevent an unrelated third party from seeking indemnity against an employer, the same result should be reached under the almost identical § 905(a) of the LHWCA. While this argument may be superficially appealing, it must fail for a number of reasons. First, Lockheed involved a suit for indemnity, rather than contribution, which is sought here. This difference is important because, at least until the 1972 amendments, third parties were allowed to sue employers on an indemnity theory under the LHWCA, see *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956), n2 but not on a contribution theory, see *Halcyon, supra.* Thus, Lockheed's comparison, for purposes of an indemnity suit, of the FECA and the LHWCA is not relevant to a LHWCA suit for contribution.

n2 The 1972 amendments, as *Lockheed* concludes, did not change the pre-1972 right of an unrelated non-vessel third party to seek indemnity from the employer of the injured person.

Second, and more important, the holdings in *Halcyon* and *Atlantic Coast* which Caruthersville asks us not to follow were not based on the LHWCA limitation of liability provision discussed in *Lockheed* but rather on the Court's holdings that on the facts of those cases, there was no basis for finding that Congress intended to allow an employer to be sued for contribution. *Halcyon, supra*, 342, n.8, 103 S.Ct. at 1037-8, n.8. Therefore, neither § 905(a) of the LHWCA nor a case such as *Lockheed* which interprets a similar statute applies here because under *Halcyon* and *Atlantic Coast*, § 905(a) is not of importance in deciding this question in the first place.

We conclude, therefore, that *Lockheed* does not overrule *Halcyon* and *Atlantic Coast* appears on all fours with our case, unless it has been overruled for some other reason it would still require dismissal of Carutherville's fourth-party complaint. The only possible event since *Atlantic Coast* was decided which might affects its vitality is the passage of the 1972 amendments. However, in *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974), the court discussed *Halcyon* and *Atlantic Coast* and concluded that those cases were still good law on their facts even in light of the 1972 amendments. The *Cooper* Court, in fact, concluded that the 1972 amendments reinforced the rationale on which *Halcyon* and *Atlantic Coast* were based, that is, that as between an employer and its injured employee, the employee's right to compensation under the LHWCA should be the exclusive remedy against the employer. The 1972 amendments therefore left untouched the holdings in *Halcyon* and *Atlantic Coast* that Congress did not intend that an action for contribution would be available against the injured party's employer. Accord, *Nieves v. Douglas Steamship*, 451 F. Supp. 407 (S.C. N. Y. 1978). Further, as we stated in our earlier discussion, the court in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), admonished that courts especially should not overturn settled maritime doctrines when Congress has acted in reliance upon those doctrines. Therefore, since Congress, in the 1972 amendments, did not affirmatively overrule *Halcyon* as it chose to do with other maritime doctrines, we will not read into the 1972 amendments an intent to change *Halcyon*.

Accordingly, we hold that Caruthersville's suit for contribution is barred by *Halcon* and *Atlantic Coast* and grant the Employer's motion to dismiss.

CONCLUSION

For the reasons discussed herein, we deny third-party defenddant's motion to dismiss and grant fourth-party defendant's motion to dismiss.